STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0601

Minnesota Voters Alliance, et al.,
Petitioners,

vs.

State of Minnesota,
Respondent,

Minnesota Secretary of State Steve Simon,
Respondent.

Filed February 1, 2021
Petition dismissed
Reyes, Judge

Minnesota Secretary of State

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for petitioners)

Keith Ellison, Attorney General, Nathan J. Hartshorn, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Gaïtas, Judge.

SYLLABUS

To have standing in a declaratory-judgment action under Minn. Stat. § 14.44 (2018) to challenge the validity of a rule, a petitioner must demonstrate (1) a direct interest in the rule that is different in character from that of the citizenry in general; (2) an alleged harm that is not speculative or hypothetical; and (3) an alleged harm that is uniquely attributable to the rule.

OPINION

REYES, Judge

In this declaratory-judgment action under Minn. Stat. § 14.44 (2018), petitioners seek to invalidate Minn. R. 8210.2450, subp. 1 (2019) (the rule) arguing that it contradicts Minn. Stat. § 203B.121, subd. 2(a) (2018). Petitioners contend that the rule exceeds statutory authority because "deputy county auditors" and "deputy city clerks" (collectively, "deputies") who serve on ballot boards are "election judges" who must disclose their party affiliation and maintain partisan balance with respect to other major political parties under the statute. Petitioners also seek fees and expenses under the Minnesota Equal Access to Justice Act (MEAJA), Minn. Stat. §§ 15.471-.474 (2018). We conclude that, because petitioners' alleged injury is speculative, hypothetical, and not attributable to the rule, they lack standing under section 14.44 to challenge the rule. We therefore dismiss the petition for declaratory judgment.

FACTS

Petitioner Minnesota Voters Alliance (MVA) is an organization comprising members who seek to ensure "public confidence in the integrity of Minnesota's elections," election results, systems, and procedures, and to enforce election laws. MVA seeks to protect the rights of its members when a law, statute, rule, or regulation interferes with their rights and privileges related to voting.

Petitioners Mary Franson, Duane Quam, and Eric Lucero (candidate petitioners) are members of MVA who currently represent House Districts 8B, 25A, and 30B respectively, in the Minnesota House of Representatives and sought reelection in the 2020 election cycle.

Petitioners Susan Jeffers, Lora Lee Shreir, Charles Halverson, and Colin L. Wilkinson (prospective election judge petitioners) are members of MVA who sought to serve as election judges in Ramsey County, Olmsted County, the City of Minneapolis, and Anoka County, respectively. All are members of the same major political party in Minnesota. Only Jeffers and Schreir have served as election judges previously.

In 2010, the legislature enacted Minn. Stat. § 203B.121 (the ballot-board statute) to provide for review of absentee ballots in Minnesota elections. 2010 Minn. Laws ch. 194 § 9, at 125. Subdivision 1(a) of the ballot-board statute provides the appointment process and explains who may serve on the ballot board:

> The governing body of each county, municipality, and school district with responsibility to accept and reject absentee ballots must, by ordinance or resolution, establish a ballot board. The board must consist of a sufficient number of *election judges trained in the handling of absentee ballots* and appointed as provided in sections 204B.19 to 204B.22. The board *may* include *deputy county auditors or deputy city clerks who have received training in the processing and counting of absentee ballots*.

Minn. Stat. § 203B.121, subd. 1(a) (2018) (emphasis added). After the ballot board is established, subdivision 2(a) governs the duties of the different ballot-board members:

> The *members of the ballot board* shall take possession of all return envelopes delivered to them in accordance with section 203B.08. *Upon receipt from the county auditor*, municipal clerk, or school district clerk, two or more *members of the ballot board* shall examine each return envelope and shall mark it accepted or rejected in the manner provided in this subdivision. *Election judges performing the duties in this section must be of different major political parties*, unless they are exempt from that requirement under section 205.075, subdivision 4, or section 205A.10, subdivision 2.

Minn. Stat. § 203B.121, subd. 2(a) (2018) (emphasis added).

The rule as it relates to the ballot-board statute states:

> Two or more ballot board members from different major political parties must review the absentee ballots returned for the precinct under Minnesota Statutes, section 203B.121, *unless they are deputy county auditors or deputy city clerks who have received training in the processing and counting of absentee ballots*, or are exempt from that requirement under Minnesota Statutes, section 205.075, subdivision 4, or Minnesota Statutes, section 205A.10, subdivision 2.

(Emphasis added.)

ISSUES

I. Do petitioners have standing to assert this declaratory-judgment action under Minn. Stat. § 14.44?

II. Are petitioners entitled to fees under MEAJA?

ANALYSIS

Under Minn. Stat. § 14.44, an interested party may challenge the validity of an agency rule "when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner." The petitioner may seek to have a rule declared invalid if it (1) violates the constitution; (2) exceeds statutory authority; or (3) is adopted without compliance with rulemaking procedures. Minn. Stat. § 14.45 (2018). In this preenforcement context, this court is restricted to considering these three bases for declaring a rule invalid. *Coal. of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 164 (Minn. App. 2009), *review denied* (Minn. Aug. 11, 2009). Petitioners only challenge the rule as exceeding statutory authority.

I. Petitioners lack standing under Minn. Stat. § 14.44.

As an initial matter, respondents argue that petitioners lack standing. We agree.

Courts apply general principles of justiciability governing declaratory-judgment standing to determine whether a party has standing under section 14.44. *See Rocco Altobelli, Inc. v. State, Dep't of Commerce*, 524 N.W.2d 30, 34 (Minn. App. 1994) (citing *State ex rel. Smith v. Haveland*, 25 N.W.2d 474, 477 (Minn. 1946)); *see also Arens v. Village of Rogers*, 61 N.W.2d 508, 512-13 (1953)). Under these principles, "[p]etitioners must have a direct interest in the validity of that rule which is different in character from the interest of the citizenry in general." *Rocco Altobelli*, 524 N.W.2d at 34 (quotation omitted). Additionally, the mere possibility of injury or a mere interest in a problem cannot confer standing. *Id*.; *see also Byrd v. Indep. Sch. Dist. No. 194*, 495 N.W.2d 226, 231 (Minn. App. 1993) ("Because IBEW's 'injury' is speculative, we conclude IBEW lacks standing to pursue its claims."), *review denied* (Minn. Apr. 20, 1993). Petitioners' alleged harm cannot be speculative or "predicated on hypothetical facts." *Save Mille Lacs Sportsfishing v. Minn. Dep't of Nat. Res.*, 859 N.W.2d 845, 853-54 (Minn. App. 2015) (Hudson, J., concurring) (indicating that majority opinion noted potential standing issue, but declined to dismiss on that ground as parties had not raised the issue). To satisfy redressability, the injury must also be attributable to the challenged rule, and petitioners must show that the rule is applied to or is about to be applied to their disadvantage. *Rocco Altobelli*, 524 N.W.2d at 34-35 (explaining that injury claimed by petitioners was not attributable to the rule).

In sum, we hold that, to establish standing under section 14.44, a petitioner must demonstrate (1) a direct interest in the rule that is different in character from that of the citizenry in general; (2) the alleged harm is not speculative or hypothetical; and (3) the alleged harm is uniquely attributable to the rule.

Here, MVA asserts an independent interest in preserving the integrity of elections. Because MVA's interest is no different in character than that of the citizenry in general, MVA must derive any potential standing from its members. *See Save Mille Lacs*, 859 N.W.2d at 854 (noting that a corporation may sue on behalf of its individual members) (citing *Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 221 N.W.2d 162, 165-66 (Minn. 1974)); *Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 177 (Minn. App. 2012) (associations must show injury-in-fact to its members to have standing); *Hanson v. Woolston*, 701 N.W.2d 257, 262 (Minn. App. 2005) (an injury-in-fact is concrete and actual or imminent).

Candidate petitioners assert that their interest in the fairness of the elections is different in nature from the citizenry in general because they may assume office if elected. We agree that, because candidate petitioners may assume office if elected, their interest is indeed different in character from the citizenry in general. However, their theory of harm nevertheless fails under the second and third considerations.

Candidate petitioners allege that they have "reason to believe" their right or privilege to take office will be threatened "if a significant number of ineligible voters cast ballots[,] thereby undermining the credibility and legitimacy of the election results." They suggest ineligible absentee voters would harm their major political party more than other

parties.[1] Their position requires a chain of hypothetical claims not supported by the record. Namely, their position requires this court to speculate that: (1) there are ineligible voters casting absentee ballots; (2) those absentee ballots are examined by deputies, not election judges; (3) deputies are more likely than election judges to count ineligible votes; and (4) deputies count those absentee ballots from ineligible voters. Even assuming the rule results in ballot boards counting more ineligible absentee votes, petitioners would require us to make yet another assumption to show that the injury is attributable to the rule: that deputies will count more ineligible absentee votes for one candidate or party than others. Their chain of hypothetical claims is even more speculative than the theory of injury in *Save Mille Lacs*, involving additional links in the chain that are based in neither fact nor law. 859 N.W.2d at 853-54. This degree of conjecture cannot confer standing because their theory of harm is speculative, hypothetical, and not attributable to the rule that petitioners seek to challenge. Accordingly, we conclude that candidate petitioners lack standing under the second and third considerations.

Prospective election judge petitioners allege a desire to personally serve as election judges and that deputies are being appointed in lieu of them. First, whether prospective election judge petitioners allege an interest that is direct and different in character than that of the citizenry in general is tenuous. Similarly, the prospective election judge petitioners' alleged harm, that "non-partisan persons" who were "not appointed by the governing body"

[1] At oral argument, petitioners clarified that, because they are all members of the Republican party, their concern is that only deputies who are members of the Democratic-Farmer-Labor (DFL) party would review absentee ballots in jurisdictions that are predominantly DFL-leaning.

have accepted or rejected absentee ballots, is speculative, not supported by the record, and at times inconsistent:[2] More importantly, on the third consideration, prospective election judge petitioners do not clearly articulate how the rule creates a harm uniquely attributable to it or that will be applied to their disadvantage. Prospective election judge petitioners' allegations concern the appointment process of ballot-board members, not the rule. The rule they seek to challenge does not govern appointments. A decision from this court invalidating the rule would not redress their alleged injury. As a result, prospective election judge petitioners lack standing under each of the three considerations.

We conclude that all petitioners lack standing to challenge the rule under section 14.44 because their theories of injury are speculative, hypothetical, and not attributable to the rule. Accordingly, we need not consider the merits of petitioners' challenge. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 341 (Minn. 2011) (noting when the issue raised is one of justiciability, courts need not reach the merits of the underlying controversy).

II. Petitioners are not entitled to fees or expenses under the Minnesota Equal Access to Justice Act (MEAJA), Minn. Stat. §§ 15.471-.474 (2018).

Under MEAJA, a petitioner who prevails against the state in certain cases may seek "fees" and "expenses." Minn. Stat. § 15.472(a) ("If a prevailing party other than the state, in a civil action . . . against the state, shows that the position of the state was not

[2] Petitioners' brief states that the deputies are "non-partisan persons" but at oral argument, their theory of harm was that the deputies are partisan.

substantially justified" then the court shall award fees and other expenses.). Because petitioners have not prevailed, we deny their request.

D E C I S I O N

Under Minn. Stat. § 14.44, because petitioners' alleged harm is speculative, hypothetical, and not attributable to the rule they seek to challenge, we dismiss the petition for lack of standing. Fees and expenses are denied.

Petition dismissed.